Nos. 19,745, 19,761 and 21,099

IN THE

United States Court of Appeals

For the Ninth Circuit

ELY VALLEY MINES, INC., et al., *Appellants,* vs. LAWRENCE RUST LEE, et al., *Appellees.*	No. 19,745
ELY VALLEY MINES, INC., et al., *Appellants,* vs. AMERICO L. CAMPINI, et al., *Appellees.*	No. 19,761 and No. 21,099

APPELLEES' REPLY BRIEF

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I

INTRODUCTION

At the outset it should be noted that the designation of parties on this appeal, which appears on the cover of appellant's opening brief, is incorrect in several regards.

First, the appellant is John Janney; it is not Ely Valley Mines, Inc. and Pioche Mines Consolidated,

Inc. The said John Janney purports to speak for the said corporations, but he has no authority whatever to do so as is shown below. The said corporations are, at the present time, under the control of a receiver, although the trial court is presently in the process of settling the accounts of the said receiver, and will, upon completion, discharge him pursuant to the mandate of this court in its principal decision in this case, reported at 333 F. 2d 257.

The trial court has found, and it has become the law of the case, that these corporations have no valid boards of directors, and therefore, no valid officers. (See Finding 4, R. 1247 on previous appeal.)

This court, in its principal decision, affirmed the judgment against John Janney for his gross wrongs to the extent of one million dollars against the said corporations arising out of his one man control over them and affirmed the restraining orders the trial court entered against him, except as to certain personal assets not here involved.

See also the Petition for Rehearing purportedly filed in the same action in this court by the purported directors of the corporations, where they complain, at page 2:

> "The opinion of this Court, entered May 21, 1964, correctly removes the receiver of the Appellant corporations herein, but likewise restrains the corporate management from acting as legal agent for the corporations. This leaves the corporations, which must act through agents, without agents through which to act." (Emphasis added) (Note:

> This document was stricken from the files of this court, and is referred to here only as an admission.)

Attention is also invited to the ruling of the trial court in its recent order striking a document purportedly filed by appellant Janney on behalf of the said corporations:

> "* * * the said document is purportedly filed on behalf of defendant corporations by defendant John Janney; that the said John Janney has heretofore been enjoined from acting on behalf of the said corporations, which said injunction has become final after appeal * * *." (Tr. 19745, p. 127.)

The clearest demonstration of the fact that appellant here is Janney rather than the corporations lies in the very first contention made by Janney on this appeal: namely, that the answers of the "corporations" to the complaint of Helen Dolman should be reinstated. Appellant thus suggests that the corporations do not care for the million dollar judgment in their favor and against John Janney, and wish to relitigate the merits of the questions already exhaustively passed upon by this court.

Such contention is obvious nonsense, and demonstrates forcibly that counsel for appellant Janney, while purporting to act for the said corporations, is in fact acting for the *sole benefit of* Janney and *against* the interests of the said corporations, and that the appellant here is Janney alone.

A second error in the designation of the parties on this appeal appears in the listing of the individuals on the cover of appellant's opening brief as appellees in Action Nos. 19761 and 21099. An attempt was made to bring in the said individuals as new parties by a new counterclaim. (Tr. 19745, page 91.) That counterclaim was stricken by the trial court and appellant has abandoned his appeal from the said order striking this counterclaim. (Opening Brief, page 6.) The said individuals are thus not parties to this lawsuit.

Also, by way of introduction, we must note that appellant's opening brief contains a great many recitations of purported fact without any citation whatever to the record, contrary to this court's rule 18 (2c). Many of these statements are either inaccurate or incorrect. Rather than recite the entire factual basis for the instant appeal correctly, at one time, we confine ourselves to correcting such misstatements as are pertinent to this appeal at appropriate points. By this we do not mean to imply that the remaining allegedly factual statements of appellants are correct; we simply do not wish to impose further on this court's patience.

II

ORDER STRIKING ANSWERS AND COUNTERCLAIMS

Under this heading, appellant John Janney argues that the trial court erred in striking the answer of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. The authorities cited (Opening Brief, pages 17-18) deal with the *adequacy* of pleadings.

Such authorities have nothing whatever to do with the instant appeal for the subject answer was stricken, not because it was inadequate, but simply because there was no basis for filing *any* answer. (Tr. 19745, page 126, lines 25-28; page 127, lines 17-25.)

This court, 333 F. 2d 257 at 277, directed that:

> "IV. The order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their *counterclaims.*" (Emphasis added.)

The trial court thereupon ordered:

> "That part of said judgment heretofore entered by this court on October 8, 1962 against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is hereby vacated and set aside, and the counterclaims filed on April 4, 1960 on behalf of said corporations be, and the same hereby are reinstated." (Tr. 21099, page 149.)

It is difficult to see how the trial court could have followed the directions of this court more exactly!

Appellant Janney's argument actually is that *this* court's mandate was in error, that this court should have reinstated the answer as well as the counterclaim. Such contentions were disposed of by this

court when it rejected Janney's petition for rehearing, and by the Supreme Court, when it rejected Janney's Petition for Writ of Certiorari.

This court specifically ordered the default of the corporations set aside and directed that their *counterclaims* be reinstated. This court did *not* direct that the answer of the corporations be reinstated for obvious reasons i.e. such answer purportedly on behalf of the corporations, sought only to relitigate the wrongdoings of defendant Janney.

Appellant Janney, inadvertently we are sure, is in error in claiming that there was no answer by the corporation before the trial court at the time the principal appeal was determined. See 333 F. 2d at page 261, where this court specifically noted:

> "On April 4, 1960, the two corporations answered."

Appellant Janney's contention that the said answer was to the original complaint and not to the amended complaint is sheer sophistry. The two complaints were identical except that additional parties plaintiff appeared in the amended complaint in order to permit a more adequate representation by various stockholders. (Tr. 21099, pages 64-65.)

It is thus clear that the trial court was precisely correct in striking the answer filed by Janney purportedly for the corporations, and that the present appeal constitutes but a further example of the consummate effrontery of Janney in continuing to attempt to use the corporations for his own purposes.

III

THE RESTRAINING ORDER

Under this heading, appellant Janney, apparently, argues that the trial court erred in issuing its order on October 5, 1964, restraining *him,* directly or through his agents, from attempting to take over at that time, physical possession of the properties of the corporations. In support of his argument Janney cites (Opening Brief, pages 19-20) general law concerning preliminary injunctions.

The inappropriateness of such argument is clear.

The trial court had already entered its judgment after extended trial against John Janney, finding him guilty of extraordinary wrongdoings against the corporations, and restraining him from further control over the said corporations. These determinations and restraining orders against Janney were *affirmed* by this court on appeal in its principal decision at 333 F. 2d 257.

With consummate aplomb Janney thereafter attempted to physically retake the properties. (Tr. 19761, pages 6-7.) While contempt procedures might have been more appropriate, the extraordinary contention now made by Janney that the court had no power, without preliminary notice and hearing, to temporarily enjoin him hardly needs reply.

The contention is even more remarkable when it is noted that at the very time here involved, October, 1964, Janney was complaining to this court, in his Petition for Rehearing, after the principal decision

of this court affirming the judgment and restraining orders against him, as follows:

> "In addition both corporations have a substantial interest in continuing to enjoy the services of an honest, efficient and experienced President. *Their interests will be prejudiced if the judgment that deprives them of these services is not stayed until they can be heard.*" (Appellants' Petition for Rehearing, page 4; emphasis added.)

Needless to say, no such restraining order was issued by this or any other court. This court, by written order dated September 23, 1964, Action No. 18402, specifically denied stay of execution of the judgment. Janney, thereupon, in his Petition for Writ of Certiorari to the United States Supreme Court, dated October 28, 1964, at page 15, complained to that court:

> "In addition, both corporations have a substantial interest in continuing to enjoy the services of their President. *Their interests are prejudiced by a judgment that deprives them of these services.*" (Emphasis added.)

At the time of the issuance of the restraining order, the trial court was exactly following the mandate of this court in attempting to settle the accounts of the receiver (Tr. 19745, page 5) and *then* relieve him of his responsibilities. Until that was accomplished, obviously the receiver had charge of the properties, and, equally obvious, was the court's power to restrain Janney in his attempt to force his way onto the properties.

IV

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

Under this heading appellant Janney contends that the trial court erred in denying his motion to alter or amend the judgment entered after appeal. The motion was denied upon the ground that it was not timely, under Rule 59 of the Federal Rules of Civil Procedure. (Tr. 21099, page 178.)

Preliminarily it must be noted that appellant's opening brief does not contend in any way that the said judgment after appeal is incorrect in any regard. A careful examination of the said judgment (Tr. 21099, pages 148-153) shows that it follows this court's mandate (333 F. 2d 257, 276) precisely and exactly.

Appellant Janney, in his Points and Authorities in Opposition to Motion to Dismiss Appeals, filed in these appeals July 8, 1966, conceded:

> "* * * a reading of the lower Court's Judgment and Orders After Appeal would indicate that the only apparent deviation by the lower court in its attempted compliance was in regard to Paragraph 13 (c), at Page 277 of this Court's Decision."

An examination of the said paragraph 13 (c) shows that it too precisely follows the mandate of this court.

Appellant Janney argues (Opening Brief, pages 21-22) that the trial court erred in denying his motion to alter the judgment and cites as his authority cases concerning entry of judgment. Appellant Janney argues that the judgment was entered on November 30, 1964, and that his motion to alter was, therefore, timely.

Appellant Janney is less than candid in failing to note that there was a hearing lasting several days in the trial court on this matter (Tr. 21099, page 36), with all parties present (Tr. 21099, page 178) and at that hearing extensive evidence was introduced, both oral and documentary, concerning the time of entry of the subject order. Appellant Janney requested that a portion of the reporter's transcript of the said hearing be included in the record on appeal (see Appellant's Desigation of Record filed in the trial court on July 27, 1965 (Tr. 21099, page 43), which was adopted by appellant Janney in his "Statement of Points and Designation of Record" filed in this court November 15, 1966. In that designation Janney requested:

> "* * * a portion of the reporter's transcript of proceedings of June 21 and June 22, 1965, relating to the motion to retax costs and the motion to alter or amend judgment, including testimony of Ethel Barton and attempt to offer the testimony of Rose Kizer, including notation as to time when Mrs. Kizer left the courtroom." (Note: These witnesses were clerks of the court.)

See also Tr. 21099, page 38 et seq. where Janney, in his listing of points to be urged on appeal clearly spells out the fact issue resolved by the trial court.

The trial court, based upon evidence introduced at the said hearing found that the judgment had been entered on November 23, 1964. (Tr. 21099, page 56.)

Appellant Janney apparently has abandoned his request to have the said reporter's transcript included

in the record on appeal. (See Points and Authorities in Opposition To Motion To Dismiss Appeals filed by Janney in this court July 8, 1966, page 6.) Janney now attempts to premise his argument before this court upon a docket entry, ignoring the fact that the trial court has already considered this matter and ruled thereon, upon the basis of extensive evidence, including the said docket entry, as well as a great deal of other evidence.

Before this court then the question, obviously, is not "What are the docket entries?" but rather "Did the trial court err in finding that the order involved herein was entered on November 23, 1964?"

Appellant Janney makes no attempt to review the evidence before the trial court. Instead, he contends that action of the clerk of the court is superior to that of the judge! This is obvious nonsense.

Lest, however, there be any thought that there was not good and sufficient evidence before the trial court to sustain its finding that the judgment involved here *was* entered on November 23, 1964, even though appellant has not brought up the evidence below, the attention of this court is invited to at least one example of that evidence below (see Tr. 21099 at page 32), where, under date of November 23, 1964, appears the following entry:

> "filing judgment and orders after appeal. *Entg. judgment and orders after appeal.*" (Emphasis added.)

It is respectfully submitted that inasmuch as appellant Janney has chosen not to bring before this court

the reporter's transcript and evidence adduced before the trial court on the instant question, although he had originally designated the same, he cannot be heard here arguing that the trial court erred and that this court should make a fact determination contrary to the determination of trial court.

V

MOTION TO RETAX

Under this heading, appellant Janney contends that the trial court erred in striking a cost bill filed by him purportedly on behalf of Ely Valley Mines, Inc.

Appellant Janney states (Opening Brief, pages 9-10):

> (1) That the said cost bill was filed on January 6, 1965;
>
> (2) Pursuant to the rules of court, the same was required to be filed not later than five days after notice of entry of the decree of judgment; and
>
> (3) That the civil docket does not show service of any notice of entry of judgment.

Because the docket does not show service of notice of entry of judgment, Janney contends that the trial court erred in finding that notice of entry of the said judgment was given not later than November 30, 1964.

Again appellant Janney ignores the fact that this matter was heard by the trial court, at a contested

hearing lasting several days (Tr. 21099, page 36), with all parties present (Tr. 21099, page 54), with evidence introduced, and a finding made by the trial court, based upon such evidence that notice was indeed given not later than November 30, 1964 (Tr. 21099, page 55).

Inasmuch as appellant Janney has not brought before this court the record, the reporter's transcript and the evidence that was before the trial court when it considered this matter, he cannot now question that finding.

See *Rosenblum v. Anglin,* 135 F. 2d 512, where this court said, at 513:

> "Evidence was received at the trial, but was not made a part of the record on appeal. Therefore the trial court's findings of fact must be accepted by us as correct."

Even though appellant Janney has not brought up the evidence below, attention is invited to Tr. 21099, page 42, line 28 where appellant Janney designates as part of the record on this appeal:

> "Clerk's letter to counsel advising of the entry of Judgment and Orders after Appeal, dated November 30, 1964."

VI

CONCLUSION

It is respectfully submitted that the instant appeals are totally devoid of merit and should be summarily denied.

Dated, San Francisco, California,
January 20, 1964.

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ARTHUR H. CONNOLLY, JR.,
GERALD J. O'CONNOR,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellees.